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Nos. 90-1241 and 90-1517

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY,
*Petitioner,*

v.

STATE OF OHIO, et al.,

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STATE OF OHIO, et al.,
*Cross Petitioners*

v.

UNITED STATES DEPARTMENT OF ENERGY

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## BRIEF FOR AMICUS CURIAE NATURAL RESOURCES DEFENSE COUNCIL

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## STATEMENT OF INTEREST

This amicus curiae brief is filed on behalf of the Natural Resources Defense Council ("NRDC"), in support of the State of Ohio. A written consent of all parties to the filing of this brief has been obtained and filed with this Court.

NRDC is a national environmental organization with more than 150,000 members and a staff of 175 lawyers, scientists, resource specialists and support personnel. NRDC maintains offices in New York, New York; Washington, DC; San Francisco, California; Los Angeles, California and Honolulu, Hawaii.

This Court's ruling on the issue of civil penalties against federal facilities is of vital importance to NRDC. The organization has long been concerned about safety and environmental problems at federal facilities, particularly those operated by the Departments of Defense and Energy. NRDC has brought enforcement actions under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6972, including cases against Department of Energy (DOE) facilities in Oak Ridge, Tennessee and the Savannah River Plant in South Carolina. In fact, an NRDC case in 1984 established the applicability of RCRA to DOE facilities. See Leaf v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984).

NRDC's experience in enforcing RCRA against federal facilities is that despite the organization's best efforts, and those of other environmental groups and many states, mismanagement of hazardous waste is widespread and continues to represent a serious public health threat. The abatement of environmental violations of federal facilities can only be achieved if all requirements of state hazardous waste laws, both substantive and procedural, are imposed against violating facilities. For this reason, NRDC has a substantial interest in this appeal and urges the Court, for the reasons set forth herein, to adopt the position of the State of Ohio on all issues.

## SUMMARY OF ARGUMENT

Congress has strong public policy reasons when it enacted Section 6001 of RCRA, 42 U.S.C. §6961, to enable states, as primary enforcers of RCRA, to seek monetary penalties and thus maintain a credible deterrence against hazardous waste law violations. Enforce-

ment without penalties cannot effectively deter future violations. Without penalties, the enforcement program is simply without serious force and effect, nor is the responsibility for such violations fairly shared throughout the regulated community. Congress plainly waived sovereign immunity from civil penalties for federal facilities both with respect to Section 6001 as well as the RCRA citizen suit provision, 42 U.S.C. §6972. This intent is evident by the plain language and legislative history, as well as the historical context in which Congress considered the compliance record of federal facilities and the obvious need for appropriate penalties.

Finally, the Environmental Protection Agency's ("EPA") implementation of RCRA demonstrates that the agency responsible for implementation of this critical law clearly believes that federal facilities are subject to civil penalties for violations of hazardous waste laws.

## ARGUMENT

### I. CIVIL PENALTIES ARE AN ESSENTIAL COMPONENT OF AN EFFECTIVE REGULATORY SCHEME

#### A. The Role of Civil Penalties to Enforce Hazardous Waste Laws

The imposition of civil penalties for violations of federal environmental laws is deeply embedded in this nation's history of environmental enforcement. See, e.g., Clean Water Act, 33 U.S.C. §1319; Toxic Substances Control Act, 15 U.S.C. §2615; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §1361; Clean Air Act, 42 U.S.C. §7413; Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §1415; Resource Conservation and Recovery Act, 42 U.S.C. §6928; and the Com-

prehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9603(b).

The ineffectiveness of environmental laws absent strong penalties was recognized by Congress as early as 1972, when the Senate Public Works Committee concluded that federal water pollution control statutes prior to 1972 had substantially failed:

> The Committee further recognizes that sanctions under existing law have not been sufficient to encourage compliance with the provisions of [the] Federal Water Pollution Control Act. . . . The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions and rigid access to the Federal District Court should accomplish the objective of compliance.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, reprinted in 1972 U.S. Code Cong. & Admin. News at 8730-31.

The Department of Justice ("DOJ"), while steadfastly opposed to imposition of civil penalties upon federal facilities, frequently relies upon its record of aggressively seeking civil and criminal sanctions for violations of federal environmental law. See Cleanup at Federal Facilities: Hearings on H.R. 3781, H.R. 3782, H.R. 3783, H.R. 3784, and H.R. 3785 Before the Subcom. on Transportation, Tourism, and Hazardous Materials, 100th Cong., 2d Sess. (1988)(Statement of Roger J. Marzulla, Acting Assistant Attorney General). EPA shares the belief that sanctions for non-violators are essential, asserting recently that "penalties serve as a valuable deterrent to

noncompliance and to help focus facility managers' attention on the importance of compliance with environmental requirements." S. Rep. No. 67, 102d Cong., 1st Sess. 4 (1991). Since civil penalties are an important component of the regulatory scheme, exclusion of such sanctions when pursuing federal violators leaves a gaping hole in the environmental compliance program.

**B. The Track Record of Federal Facility Compliance**

The importance of penalties to coerce compliance is vividly illustrated in the case of federal facilities. By the late 1970's, it had become clear to the Congress that many federal facilities had fallen into serious non-compliance with federal environmental laws. It is not surprising that as a result of the cavalier attitude by federal facilities, a decade later the nation is saddled with billions of dollars in cleanup costs and a substantial threat to the public health. Hearing Before the Subcomm. on Transportation, Tourism, and Hazardous Materials at 174 (Statement of Dan Reicher).

While citizen groups continue to enforce RCRA against the federal government, the practical realities are that without a strong state enforcement presence, comprehensive and effective compliance is difficult if not impossible. Like most major environmental statutes, RCRA contemplates a multi-tiered enforcement scheme with shared authority among EPA, the states and citizen groups. Since the federal government has absented itself from seeking penalties against federal facilities - as illustrated by its opposition in this case - states and citizen groups are left to police violating federal facilities on their own. With severely limited resources, citizen groups depend upon effective and forceful state enforce-

ment programs, which are already overtaxed in their ability to take up where EPA has left off. Id. at 183.

Clearly, citizen suit authority under RCRA was meant to complement, not replace, the state and federal ability to seek strong sanctions against violators. If the state is denied the power to impose civil penalties, non-compliance will continue. In light of a federal government that refuses to act, states are the only governmental entities with effective power and adequate resources to force federal facilities to comply with environmental standards.

The facts in this case dramatically illustrate both the extent of the threat of environmental harm caused by federal facilities as well as the egregious conduct that will remain unabated unless the states have the ability to seek deterrence through penalties. Indeed, the facts of this case are not unique. EPA recently reported, in preliminary federal facility compliance statistics, that 63% of federal treatment, storage, or disposal facilities were found to be in violation of RCRA during fiscal year 1989. S. Rep. No. 67 at 4. During that same time period, 38% of private facilities, clearly subject to penalties under federal and state law, were found to be in violation. Id. This clear disparity illustrates what can occur when penalties are unavailable for an entire class of violations through a double standard of enforcement.

Hazardous waste violations in this case are profound. Without the ability to seek such penalties and abate such violations, a state's enforcement powers will be severely curtailed and a substantial number of serious hazardous waste violations would remain beyond the reach of adequate punishment.

## II. THE RCRA CITIZEN SUIT PROVISION EXPLICITLY WAIVES SOVEREIGN IMMUNITY

### A. The Plain Language of the Citizen Suit Provision Must Control

As the Sixth Circuit noted below, "Congress clearly waived sovereign immunity for civil penalties in the citizen suit provision of [RCRA]." Ohio v. U.S. Dep't of Energy, 904 F.2d 1058, 1064 (6th Cir. 1990). The plain language of Section 7002, 42 U.S.C. §6972, gives Ohio authority to bring a citizen suit seeking civil penalties to enforce state environmental laws against a federal facility.

Section 7002 provides, in pertinent part:

> . . . any person may commence a civil action on his own behalf -
>
> (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; . . .
>
> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A)15 . . . as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

42 U.S.C. §6972 (emphasis added).

Since "any person" may bring a citizen suit, and a state is included within the general definition of "person" under RCRA, 42 U.S.C. §6903(15), Ohio may properly bring a citizen suit to enforce its environmental laws against the DOE. Moreover, under Section 7002, the State of Ohio is empowered to seek civil penalties under Section 3008, 42 U.S.C. §§6928(a) and (g). Therefore, the clear language of the statute establishes that federal facilities are subject to suit, including a suit seeking civil penalties under Section 3008, 42 U.S.C. §§6928(a), 6928(g).

Based on the language of Section 3008, the DOE argues that federal facilities are not subject to civil penalties under Section 7002 citizen suits. Petitioner's Brief, Record at 41. The United States is excluded from the definition of "person" subject to civil penalties under Section 3008. See 42 U.S.C. §§6928(a) and (g), 6903(1-5). On this basis, the DOE concludes that federal facilities are not subject to civil penalties under RCRA citizen suits. The DOE's interpretation of Section 7002, however, is at odds with the plain language of the provision.

The DOE's conclusion fails to take into consideration the language and structure of the RCRA citizen suit provision. As noted above, the United States, as well as any government agency, is specifically subject to a citizen suit under Section 7002. "Section 7002 incorporates the civil penalty sections, not vice versa." Ohio v. DOE, 904 F.2d at 1065. As the Tenth Circuit recently recognized in holding the parallel Clean Water Act ("CWA") citizen suit provision applicable to federal facilities on a similar set of facts, "a specific statutory provision will govern notwithstanding the fact that a general provision, standing alone, may include the same subject matter." Sierra Club v. Lujan, 931 F.2d 1421, 1427 (10th Cir. 1991), citing United

States v. Prescon, 695 F.2d 1236, 1243 (10th Cir. 1982). Thus, the specific definition of "person" within Section 7002, which includes the United States, controls over the more general definition of "person" applicable to Section 3008. Based on this analysis, "[t]he fairest reading of [the RCRA citizen suit provision] includes the United States in the application of civil penalties." Ohio v. DOE, 904 F.2d at 1064-65.

**B. The Legislative History Supports Assessment of Civil Penalties Against Federal Facilities in Citizen Suits**

Although the legislative history concerning Section 7002 is not extensive, it does establish Congressional intent to subject federal facilities to civil penalties under the RCRA citizen suit provision. During the process of amending RCRA in 1984, the Senate Committee stated:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provision of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States . . .."

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). As the Sixth Circuit noted below, this "statement shows the Senate's intent that civil penalties would be available in a citizen suit against the United States." Ohio v. DOE, 904 F.2d. at 1065.

Consequently, based on the plain language of Section 7002 and legislative history, it is clear that Congress intended to waive sovereign immunity to allow the

recovery of civil penalties in citizen suits against federal facilities.

## III. SECTION 6001 CLEARLY PROVIDES A WAIVER OF SOVEREIGN IMMUNITY

### A. The Plain Language of Section 6001 Supports Finding A Waiver of Sovereign Immunity

The language of Section 6001 of RCRA, 42 U.S.C. §6961, provides a clear waiver of sovereign immunity. Section 6001 provides, in pertinent part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

42 U.S.C. §6961 (emphasis added).

In Ohio v. U.S. Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988), the District Court ruled that the language of Section 6001, considered in the context it was written, provides a sufficiently explicit waiver of sovereign immunity to impose liability upon the United States for civil penalties based on violations of state hazardous waste law. The District Court correctly found a clear waiver of sovereign immunity based on the plain language of the statute. Id. at 764-65.

Use of the language "all . . . requirements" evinces an intent to encompass civil penalties by the very meaning of the word "requirements." The accepted usage of the word "requirement" is "something called for or demanded: a requisite or essential condition"; a "requisite" is something "required by the nature of things or by circumstances or by the end or view: essential, indispensable, necessary." Webster's Third New International Dictionary 1929 (3d ed. 1981). The verb form "to require" means "to impose a compulsion or command upon (as a person) to do something; demand of one that something be done or some action taken: enjoin, command, or authoritatively insist that someone do something." Id.

Civil penalties imposed by a state to enforce state environmental laws "are obviously a form of enforcement requirement intended 'to impose a compulsion or command upon [someone] to do something' as the circumstances may require." Maine v. Dep't of Navy, 702 F. Supp. 322, 326 (D. Me. 1988), appeal filed, (1st Cir. No. CA86-00211). The District Court in Maine v. Dep't of Navy concluded that "civil penalties are clearly encompassed within the language 'all . . . requirements, both substantive and procedural.'" Id. at 327.

The conclusion that civil penalties are included within the term "requirements" is underscored by the parenthetical included in the statute. The parenthetical in Section 6001 is merely an example of such "requirements," and should not be construed to suggest that Congress intended that such sanctions be listed at the exclusion of others. Id. at 327. This interpretation is supported by language in the statute. The court below interpreted the term "including" in the context of Section 6001 to mean that the examples listed are merely illustrative and not exhaustive. Ohio v. Doe, 904 F.2d at 1063, citing P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 at 77 n.7 (1979). Indeed, in drafting the RCRA federal facilities provision, "Congress used comprehensive and encompassing language without limitation: 'all . . . State . . . requirements, both substantive and procedural.' Any first year law student would think that language covered the universe; there is no reason to think that the statutory drafters had any other understanding." Maine v. Dep't of Navy, 702 F. Supp. at 338. Under this reading, civil penalties clearly fall within the meaning of "requirements."

An explicit waiver of sovereign immunity may result from either a detailed accounting of each and every "requirement" that may be imposed upon the federal government or, in this case, by an all encompassing provision that has been properly described as a "single stroke." Id at 327. "It would be nonsensical to require Congress to make a detailed punchlist of all of the 'requirements' set out in the entire body of environmental law of the federal government and each of the fifty states." Id.

Even if the parenthetical in Section 6001 were construed as representing a finite list of "requirements," imposition of civil penalties upon federal facilities would

not be inconsistent with such an interpretation because of the statute's reference to "sanctions." The statute's reference to such "sanctions" in the context of enforcing injunctive relief does not mean that Congress meant that only those types of sanctions are permissible under the section. To the contrary, the commonly understood meaning of "sanctions" includes penalties and fines irrespective of the form of relief sought. See Black's Law Dictionary 1203 (5th ed. 1979) ("sanctions" defined as "part of a law which is designed to secure enforcement by imposing a penalty for its violation . . . ."). Sanctions are set out as an illustration of what the statute means by "requirements."

Finally, courts will interpret statutory language to avoid unreasonable results. U.S. v. Ohio Barge Lines, Inc., 607 F.2d 624, 629 (3d Cir. 1979). Under this rule of statutory construction, the parenthetical cannot represent an exhaustive list of requirements covered by the statute. The statute clearly states that "all requirements, both substantive and procedural" are covered. It is inconsistent with this language to read the parenthetical information as an exhaustive list. "[A]ll requirements" cannot be satisfied by federal facilities adhering to the four listed examples. To preserve the wide array of requirements clearly applying to federal facilities, the statute can only be read in a manner that finds the types of requirements listed in the statute illustrative in nature. Considering this broad grant, the Court must not carve out exceptions and thereby thwart Congress' clear intent. Canadian Aviator v. United States, 324 U.S. 215, 222 (1945).

### B. The Legislative History of RCRA Reflects Congressional Intent to Subject Federal Facilities to Civil Penalties

Courts are required to interpret statutes in a manner that honors congressional intent. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). A review of the legislative history of RCRA, as well as an analysis of the historical context of the sovereign immunity issue at the time RCRA was adopted, demonstrates that Congress clearly intended that federal facilities would be subject to all state requirements, including civil penalties.

In June, 1976, the Supreme Court ruled that Section 118 of the Clean Air Act ("CAA"), 42 U.S.C. §7418, did not require federal facilities to comply with state permit requirements governing air emissions. Hancock v. Train, 426 U.S. 167 (1976). At the time Hancock was decided, Section 118 provided that federal facilities must comply "with Federal, State, interstate, and local requirements respecting the control and abatement of air pollution." The Court determined that sovereign immunity was not waived by noting Congress' failure to subject federal facilities to "all Federal, State, interstate, and local requirement." Id. at 182. Likewise, in an accompanying decision, the Court held that the parallel provision in the CWA, providing that federal facilities "must comply with Federal, State, interstate and local requirements," also failed to waive sovereign immunity. EPA v. California 426 U.S. 200 (1976).

In October 1976, shortly after the decisions in Hancock and California, Congress considered, and passed, RCRA. "In reaction to the [Hancock] decision, Congress enacted language [in Section 6001] clearly intended to obviate the effect of the distinction highlighted in the [Hancock] opinion upon an effective comprehen-

sive waiver of sovereign immunity." Maine v. Dep't of Navy, 702 F. Supp. at 327. Recognizing that Court decisions required Congress to be more specific with respect to waiving sovereign immunity for environmental liability for federal facilities, Congress made clear that, under RCRA, federal facilities shall be subject to "all . . . requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal in the same manner and to the same extent, as any person is subject to the such requirements. . . " 42 U.S.C. §6961 (emphasis added).

The following year, in 1977, Congress amended the federal facility provision of the CAA, "intend[ing to] fundamentally overrule the Supreme Court's ruling in Hancock v. Train." H.R. No. 294, 95th Cong., 1st Sess., 12, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1089 (emphasis added). Under the amended CAA, federal facilities are subject to "all . . . requirements . . . respecting the control and abatement of . . . pollution in the same manner and to the same extent as any nongovernmental entity." 42 U.S.C. §7418 (emphasis added). As the House report accompanying the 1977 Amendments makes clear, the CAA was amended to ensure that "federal facilities and agencies may be subject to injunctive relief . . . [and] civil or criminal penalties." H.R. No. 294 at 200, reprinted in 1977 U.S. Code Cong. & Admin. News at 1279 (emphasis added).

In 1977, the federal facilities provision of the CWA was also amended "to conform with [the] comparable provision in the Clean Air Act." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess., 93, reprinted in 1977 U.S. Code Cong. & Admin. News 4424, 4468. As amended, the CWA subjects federal facilities to "all . . . requirements . . . respecting the control and abatement of . . . pollution

in the same manner and to the same extent as any nongovernmental entity." 42 U.S.C. §1323 (emphasis added). The Senate report accompanying the 1977 Amendments notes that the Act was amended because "the Supreme Court . . . misconstrued the original intent" of Congress to subject federal facilities and activities "to all the provisions of State and local pollution laws." S. Rep. 370, 95th Cong., 1st Sess., 67, reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4392.

A careful review of the legislative history of Section 6001 of RCRA underscores the intent of Congress to waive sovereign immunity with respect to civil penalties for federal facilities. When the federal facility provision was first considered by Congress, two bills were proposed. The House Bill, H.R. 14496, 94th Cong., 2d. Sess. (1976), exempted federal facilities from state law and instead subjected such facilities to the exclusive authority of EPA. H.R. No. 1491, 94th Cong., 2d Sess., 49-51, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6287. Congress rejected the House Bill, and instead adopted a broader, modified Senate version which provided that federal facilities comply with "all requirements, both substantive and procedural" of both federal and state law. S. Rep. No. 988, 94th Cong., 2d Sess. 23 (1976). When Congress adopted the compromise language, it simply adopted the expansive term "all requirements," thus creating a broad waiver.

In fashioning the language of the RCRA federal facility provision, Congress was aware of the Court's interpretations in Hancock and California. See H.R. Rep. No. 1491 at 45, reprinted in 1976 U.S. Code Cong. & Admin. News at 6283, (stating that "[a]fter several circuit Court of Appeals reached conflicting decisions [regarding the responsibilities of federal facilities to the implementa-

tion of state environmental laws], the United States Supreme Court heard the cases and issued decisions" in Hancock and California). Instead, the language of RCRA requires federal facility to comply with all state requirements. Therefore, the RCRA federal facility provision, as proposed by the Senate and adopted by Congress, was not intended to perpetuate the Supreme Court's restricted interpretation of a state's ability to impose its environmental laws on federal facilities. Instead, the language exhibits a response to the narrow Supreme Court reading and a desire to allow states to impose all environmental controls upon federal facilities.

Finally, Congressional action on federal statutes taken after the adoption of RCRA in 1976 illustrates that Congress intended to enact an explicit waiver of federal facility liability under RCRA. The Conference report to the federal Superfund Amendment and Reauthorization Act of 1986 provides that:

> This clarifies that CERCLA, together with RCRA, requires Federal facilities to comply with all Federal, State and local requirements, procedural and substantive, including fees and penalties, except as provided in Section 121 [of SARA].

H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 242, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3335 (emphasis added). Congressional intent to waive sovereign immunity with respect to RCRA was echoed by Senate Majority Leader Mitchell on the Senate floor when addressing the Superfund amendments:

> Section 6001 of the Resource Conservation Recovery Act (RCRA) clearly states that federal agencies are to be "subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural." This Section, together with Section 120 of CERCLA, can leave no doubt that federal facilities are subject to State laws, including State fees and penalties.

132 Cong. Rec. at 14918 (daily ed. October 3, 1986) (Statement of Sen. Mitchell).

The legislative history, considered in its entirety, clearly supports the conclusion that Congress intended Section 6001 of RCRA to waive the sovereign immunity of federal facilities with respect to civil penalties.

## IV. EPA'S APPLICATION OF SECTION 6001 SHOULD RECEIVE DEFERENCE

While it is apparent that certain federal agencies, including the Departments of Energy, Defense, and Justice, have taken the position that federal facilities are beyond the reach of the civil penalties provision of RCRA, the Court should show deference to the interpretation of the agency charged with the enforcement of a statute, in this case the EPA. Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985). By regulation, a state hazardous waste program must meet certain minimum requirements to qualify for authorization, including the requirement that states adopt adequate civil penalty requirements. 40 C.F.R. §271.16(a). Such penalties must be available against any "person," defined in the statute to include "a state or federal agency." 40 C.F.R. §§270.2, 271.2 (emphasis added).

In the past, EPA has defined "person" to include federal facilities. For example, in Maine v. Dep't of Navy, EPA referred the Navy's violations of state hazardous waste law to the State of Maine for prosecution under state law for the express purpose of seeking civil penalties for past violations. 702 F. Supp. at 337. By its very conduct in Maine v. Dep't of Navy, EPA takes the position - not shared by DOJ - that states may recover penalties for non-complying federal facilities. The Court should adopt EPA's approach, and recognize the significance of enforcing the laws in an even-handed manner to protect human health and the environment.

**CONCLUSION**

For the foregoing reasons, NRDC respectfully requests that this Court find that Congress has waived sovereign immunity with regard to the imposition of civil penalties for violations by federal facilities of state hazardous waste laws.

Respectfully submitted,

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